TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. PETITIONERS SEEK TO DISCARD NEARLY HALF A CENTURY OF JURISPRUDENCE. . . 2

II. THERE IS NO LACK OF CONSISTENCY BETWEEN THIS COURT'S EARLIER AND MORE RECENT AID CASES. 15

III. THE ESTABLISHMENT CLAUSE STANDS AS AN IMPENETRABLE WALL AGAINST DIRECT FUNDING OF A SECTARIAN ORGANIZATION'S RELIGIOUS ACTIVITIES. 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Board of Educ. v. Allen,
392 U.S. 236 (1968) 4,6,12,15,16,17,20,23

Board of Educ. v. Grumet,
114 S. Ct. 2481 (1994) 3,7,14,20

Board of Educ. v. Mergens, 496 U.S. 226 (1990) . . 24,25

Page

Bowen v. Kendrick, 487 U.S. 589 (1988) . . 10-11,12,14,18

Bradfield v. Roberts, 175 U.S. 291 (1899) 15,18

Brusca v. State Bd. of Educ.,
332 F. Supp. 275 (E.D. Mo. 1971),
aff'd, 405 U.S. 1050 (1972) 22

Committee for Public Educ. and Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 2,10,19

Committee for Public Educ. and Religious Liberty v. Regan,
444 U.S. 646 (1980) 21

Cornelius v. NAACP Legal Defense & Educ. Fund,
473 U.S. 788 (1985) 24

Everson v. Board of Educ.,
330 U.S. 1 (1947) 3,4,6,15,16,19,20,23

Hunt v. McNair, 413 U.S. 734 (1973) 7-8,18-19

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
113 S. Ct. 2141 (1993) 24,25

Lemon v. Kurtzman, 403 U.S. 602 (1971) 4,5,6,15

Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) 22

Meek v. Pittenger, 421 U.S. 349 (1975) . . . 7,8,12,13,20

Mueller v. Allen, 463 U.S. 388 (1983) . . . 9,10,12,13,19

Page

Norwood v. Harrison, 413 U.S. 455 (1973) 22,23,24

School Dist. of Grand Rapids v. Ball,
473 U.S. 373 (1985) 9,12,13

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 18

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 15,17,18

Widmar v. Vincent, 454 U.S. 263 (1981) 24,25

Witters v. Washington Dep't of Serv. for the Blind,
474 U.S. 481 (1986) 10,12,13,19,25

Wolman v. Walter, 433 U.S. 229 (1977) 8,10,19,21

Zobrest v. Catalina Foothills Sch. Dist.,
113 S. Ct. 2462 (1993) 12,13,14,20

Other Authorities:

Esbeck, C., *Establishment Clause Limits on Governmental Interference with Religious Organizations*,
41 Wash. & Lee L. Rev. 347 (1984) 26

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Government Intervention in Religious Affairs, II 40
(Dean M. Kelley ed., 1986) 27

Levy, L.W., *The Establishment Clause: Religion and First Amendment* (1986) 3

INTEREST OF AMICUS CURIAE

Council on Religious Freedom ("CRF"), a national, nonprofit organization, exits to uphold and promote the constitutionally protected principle of religious liberty. CRF maintains a major focus on the relationship of free exercise principles to non-establishment concerns in an effort to maximize religious freedom.

CRF files this amicus brief because it believes petitioners seek to distort settled law. Such distortion will undermine this Court's established precedence: the state may not provide direct aid to primarily sectarian organizations for religious purposes.

The parties consented to the filing of this brief in a joint letter of consent submitted to the Clerk of this Court.

SUMMARY OF ARGUMENT

University of Virginia's use of student activities funds to finance the publication of an avowedly religious magazine with a Christian perspective violates the Establishment Clause. To permit expenditures of public monies on such a religious activity runs counter to almost 50 years of U.S. Supreme Court jurisprudence dealing with governmental aid to sectarian organizations. The Establishment Clause principles articulated by this Court have remained consistent, providing basic guidelines to assist in determining the propriety of governmental funding of a program or activity. Finally, the Establishment Clause protects against direct governmental funding of religious activities. The petitioners have failed to identify any basis that would justify an exception to the protection afforded by this Clause.

ARGUMENT

I. PETITIONERS SEEK TO DISCARD NEARLY HALF A CENTURY OF JURISPRUDENCE.

This case erroneously seeks to reverse almost one-half century of Supreme Court reasoning as petitioners urge adoption of "ingenious plans for channelling state aid to sectarian . . . organizations." *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973). Petitioners argue the Establishment Clause would not be offended should the University of Virginia fund proselytizing activities of a sectarian organization. This suspect argument rests on petitioner's claim: "[t]his Court has held in case after case in the last decade that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities." (Petitioners' Brf. at 29).[1]

A logical extension of such an argument would require the University of Virginia to fund an evangelistic crusade by the Reverend Jimmy Swaggart so long as other groups -- sectarian or otherwise -- also received funding for speakers who wished to speak on campus. Fortunately, this Court has never adopted petitioners' erroneous view of the Establishment Clause.

As amicus Christian Legal Society concedes, "government generally should not fund religious functions. Government may sometimes fund secular functions performed

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[1]Petitioners contend religion is not advanced within the meaning of the Establishment Clause even when a sectarian organization is "clearly engaged in the propagation of particular religious doctrines." (Petitioners' Brf. at 32-33).

by religious organizations, but those cases are not precedent for funding religious functions." (Christian Legal Society Brf. at 4). What is absent from petitioners' analyses, or from any supporting amici, is the recognition that for almost 50 years this Court has consistently distinguished between direct and indirect aid to pervasively sectarian organizations. These distinctions confound the petitioners. Without exception, this Court has struck down programs where substantial aid flows directly from a governmental source to a pervasively sectarian organization.

A long-line of Supreme Court cases beginning with *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and continuing to last term's decision in *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994), require rejection of petitioners' argument: breadth of the recipient class makes substantial aid to a pervasively sectarian organization constitutional. These cases clearly show that non-preferential treatment is not the only establishment concern of this Court.[2]

Everson v. Board of Educ., 330 U.S. 1 (1947), found constitutional a local school district program which reimbursed parents for money spent transporting their children to parochial school. This Court distinguished between *indirect* benefit to sectarian schools and *direct* aid provided to parochial schools. Under the school district's program "[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide

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[2]For a historical review of the theory that the Establishment Clause does not prohibit aid to religion on a non-preferential basis -- a theory which has never won majority by this Court -- *see* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* at 91-119 (1986).

a general program *to help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18 (emphasis supplied).

In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld a New York statute requiring local public school authorities to lend textbooks to all students in grades 7 through 12 in both public and private schools. The *Allen* Court, relying on *Everson*, observed "[t]he law merely makes available *to all children* the benefits of a general program to lend school books free of charge." *Id.* at 243 (emphasis supplied). Explaining that the textbook loan program was *not* direct aid to sectarian schools, the *Allen* Court stated:

> Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and *the financial benefit is to parents and children, not to schools*. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Id. at 243-44 (emphasis supplied).

Lemon v. Kurtzman, 403 U.S. 602 (1971), addressed appeals involving two state statutes providing various types of aid to church-related elementary and secondary schools. Pennsylvania's statute provided reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in

specified secular subjects,[3] while a Rhode Island statute allowed the state to pay directly to nonpublic, elementary school teachers, a supplement of 15% of their annual salary. The Supreme Court found both violated the Establishment Clause.

The Court did not focus on the breadth of the recipient class, rather on the nature of the aid. After discussing its concern with the potential for government interference with religion,[4] the Court stated:

> The Pennsylvania statute, moreover, has the further defect of *providing state financial aid directly to the church-related school*. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents -- not to the church-related school [citation omitted]. In *Walz v. Tax Commission*, *supra*, 397 U.S., at 675, the Court warned of the dangers of direct payments to religious organizations: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most

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[3]Of course, the state also, by separate statutes, provided public schools similar financial assistance.

[4]The Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), noted that the Rhode Island legislature was concerned with "the considerable religious activities of the sectarian schools," *id.* at 616, and were thus "led . . . to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education." *Id.*

> government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.

Id. at 621 (emphasis supplied). The Court distinguished *Everson* and *Allen* from the programs at issue in *Lemon* on the basis of the indirectness of the benefit to the sectarian schools, rather than the breadth of the class of beneficiaries.

Justice Brennan recognized in *Lemon* that benefits must be provided equally to students in both public and private schools to insure the aid is neutral as between believers and nonbelievers. However, the breadth of such inclusion alone does not trump the constitutional proscription of direct aid to pervasively sectarian institutions. Reflecting on *Board of Educ. v. Allen*, Justice Brennan observed that the government "could not provide textbooks giving religious instruction." *Lemon*, 403 U.S. at 656. According to Justice Brennan:

> More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U.S., at 244 n.6, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson*, the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children. . . . That [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.

Id. at 656.

When government aid to sectarian schools is indirect and the primary beneficiaries are individual students or their parents, the breadth of the statute may become relevant with regard to whether the program discriminates in favor of or against sectarian groups. But when the benefits flow directly to a pervasively sectarian organization, not to the student or parent, the neutrality of the program as to the recipient becomes irrelevant.[5]

In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court considered a state law providing aid only to nonpublic schools. The Court found the law furthered the state's goal of "extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students who constitute approximately one quarter of the schoolchildren in Pennsylvania." *Id.* at 363. Just because the law provided aid only to sectarian schools was irrelevant to the Court "[s]o long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two." *Id.* at 360 n.8.

However, *Meek* cautioned "[e]ven though earmarked for secular purposes, 'when [the aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion. *Hunt*

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[5]The recent opinion in *Board of Educ. v. Grumet*, 114 S. Ct. 2481, is not at odds with the concept that neutrality is irrelevant when the aid is direct. In *Grumet* the Court did not deal with the issue of providing aid only to sectarian institutions but rather dealt with the issue of whether the state was preferring one religion over another. *Id.* at 2491.

v. McNair, 413 U.S. 734 (1973)." 421 U.S. at 366.

The Court in *Wolman v. Walter*, 433 U.S. 229 (1977), faced a state law providing educational equipment and materials to sectarian schools. The Ohio law attempted to avoid the results of *Meek* by claiming educational equipment and materials were being "loaned" to the students. Thus, the students, and not the schools, were the primary beneficiaries of the program. The Court was not persuaded:

> Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Id. at 250.

In *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Court found unconstitutional two programs (a community education and a shared time) which provided state paid teachers to teach on sectarian school premises. This Court rejected the argument that the primary beneficiaries of the program were the students:

> Petitioners claim that the aid here, like the textbooks in *Allen*, flows primarily to the students, not to the religious schools. Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional materials to religious schools and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. . . . *Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, "the concept of a loan to individuals is a transparent fiction." Wolman v. Walter, supra, at 264.*

Id. at 395-96 (emphasis supplied).

In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court again followed the direct/indirect aid analysis, in sustaining a Minnesota tax deduction permitting parents of both public and nonpublic school students to deduct payments made for student tuition, textbooks, and transportation. In *Mueller* the Court

found significant that "public funds become available only as a result of numerous private choices of individual parents of school-age children." *Id.* at 399. It also found constitutional a state statute providing tax deductions for certain expenses incurred in providing education because "[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488 (1986), the Court found constitutional a state vocational rehabilitation assistance program, which permitted a blind student to receive funds which he used to attend a Christian college. The Court decided "any aid ultimately flowing to the Inland Empire School of the Bible" was not as a "result[] . . . [of] *state* action sponsoring or subsidizing religion." *Id.* (emphasis in original). The Court concluded there was no *direct* aid flowing to the religious school and observed it is "well-settled, . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State. *School Dist. of Grand Rapids v. Ball*, 473 U.S. at 394." *Id.* at 487 (emphasis in original).[6]

According to petitioners, the constitutionality of the funding of proselytizing activities depends upon a single factor -- the breadth of the class of recipients. Petitioners' mantra is "equality." *Bowen v. Kendrick*, 487 U.S. 589 (1988),

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[6]The Court, however, explained that aid may still have the effect of a direct subsidy from the state even though it takes "the form" of aid to students or parents, citing *Wolman* and *Nyquist*. *Witters*, 474 U.S. at 487.

rejected this concept. When addressing a facial attack on the Adolescent Family Life Act in *Bowen*, the Court considered more than breadth of the potential recipients. The Court observed "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that *direct government aid* to religiously affiliated institutions does not have the primary effect of advancing religion." *Id.* at 609 (emphasis supplied). According to *Bowen* "nothing on the face . . . [of the statute] indicates that a *significant proportion* of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* at 610 (emphasis supplied).

Bowen continued its inquiry. After finding the range of potential recipients broad and determining no *significant proportion* of the funds would be disbursed to pervasively sectarian organizations, the Court narrowed its focus on whether the statute was unconstitutional as applied.[7] Finding the record insufficient, it remanded the case to the district court to consider whether the aid had been used for religious activities. *Id.* at 621. Justice O'Connor, concurring in *Bowen*, stated "any use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623.[8] The *Bowen*

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[7]In *Bowen*, 487 U.S. at 601, the Court underscored the importance of the distinction between a "facial" and "as applied" analysis when reviewing a case involving Establishment Clause concerns. *Bowen* involved both types of challenges, while the instant case only involves an "as applied" challenge.

[8]Justice Kennedy, joined by Justice Scalia in a concurrence, concluded the program "is not unconstitutional by reason of the religious character of a specific recipient. The question in an applied challenge is not whether the entity is of a religious character, but how it spends the grant."

Court viewed the programs in *Witters*, *Mueller*, *Allen*, and *Everson* as acceptable because they involved *indirect* grants of governmental aid as distinguished from aid programs involving *direct* grants. *Id.* at 610.

Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), followed the indirect aid cases rationale. There the Court distinguished the direct grant to schools rationale of *Meek* and *Ball* from the attenuated benefits rationale of *Mueller* and *Witters*. *Id.* at 2468-69.

In discussing such attenuated benefits, *Zobrest* observed if the Establishment Clause were to bar religious groups from receiving any general governmental benefits, then a church would not be able to receive police and fire protection or have its sidewalks repaired. The Court then said:

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge *just because sectarian institutions may also receive an attenuated financial benefit.*

Id. at 2466 (emphasis supplied). Of course a finding that the program neutrally provides governmental benefits to a broad class defined without reference to religion does not end the

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Bowen, 487 U.S. at 624-25. Petitioners will spend monies received from the University of Virginia to promote a sectarian agenda and religious doctrine. The money will be spent by the petitioners to promote a sectarian doctrine.

inquiry if the benefit provided to pervasively sectarian institutions is not attenuated as in *Zobrest*, but rather is direct as in the instant case.

Zobrest continued its direct/indirect aid analysis, noting that under the tuition tax deduction statute, "public funds become available to sectarian schools 'only as a result of numerous private choices of individual parents of school-aged children,' thus distinguishing *Mueller* from our other cases involving 'the direct transmission of assistance from the State to the schools themselves.'" *Id.* at 2467.[9]

Zobrest carefully differentiated the attenuated financial benefit which might ultimately flow to parochial schools in the programs at issue in *Mueller* and *Witters* from the direct aid provided in *Meek* and *Ball*. Quoting *Witters*, 474 U.S. at 487, the Court concluded:

> [T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State.

Zobrest, 113 S. Ct. at 2468. Leaving no ambiguity as to the unconstitutionality of a direct subsidy to an elementary or secondary church-operated school, even if benefitting the "secular" courses of the school, the Supreme Court, relying on *Meek*, 421 U.S. 366, stated:

> "Substantial aid to the educational function of

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[9]In analyzing *Witters*, the Court likewise noticed that any aid flowing "to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 2467.

> such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity."

Id. at 2468.

Justice Souter's majority opinion in *Grumet* did not deviate from the Court's earlier analysis. Although the majority recognized the government must not engage in legislative favoritism since the Establishment Clause embraces the view that the state must not favor one religion over another (or favor religious interests over secular interests), such is only the first step in the judicial analysis. *Grumet* explained what the Court meant when in *Bowen* it "upheld a statute enlisting a 'wide spectrum of organizations' in addressing adolescent sexuality because the law was 'neutral with respect to the grantee's status as a sectarian or purely secular institution.'" *Grumet*, 114 S. Ct. at 2492. It thus rejected the concept that neutrality is the sole factor in Establishment Clause adjudication:

> The Court used "sectarian" to refer to organizations akin to this school district in that they were operated in a secular manner but had a religious affiliation; it recognized that *government aid may not flow to an institution "'in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,'"* 487 U.S., at 610 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

Id. at 2492 n.8 (emphasis supplied).

Justices Blackmun, Stevens, O'Connor, and Ginsburg joined Justice Souter in this part of the majority opinion. They agreed a statute may in certain instances properly provide benefits to a wide spectrum of organizations, including organizations operating in a secular manner but having a religious affiliation. Nevertheless when government aid flows to an organization in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, such aid is direct and unconstitutional under the Establishment Clause and a long line of decisions from this Court.

II. THERE IS NO LACK OF CONSISTENCY BETWEEN THIS COURT'S EARLIER AND MORE RECENT AID CASES.

Choosing to ignore this Court's constant reliance on a direct/indirect aid analysis, petitioners allege a lack of consistency between earlier "aid" cases (*Bradfield v. Roberts*, 175 U.S. 291 (1899); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). According to petitioners, these earlier cases "were resolved in favor of the neutral extension of benefits" concept (Petitioners' Brf. at 39) while *Lemon* "inaugurated a period in which the constitutionality of aid was seen to depend not on the neutrality of the government's own allocation of benefits, but on the character of the recipient and the use to which the benefits were put." (*Id.*).

Petitioners cite *Everson* in support of their claim that *Lemon* first expressed concern over the character of the recipient and the intended use of the benefits. Curiously, *Everson* did not focus exclusively on neutrality concerns nor

did it ignore the question of whether public funds were going to be used for sectarian purposes.

Everson held "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." 330 U.S. at 16. The Court found the "'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15.

Everson was not concerned only with preferential aid. It concluded indirect aid provided in the form of private transportation funds to parents was "so separate and so indisputably marked off from the religious function" of the sectarian schools as not to constitute aid to religion. Not a single justice suggested, as do petitioners, because transportation funding was provided to both public and nonpublic school students, the character or purpose of the aid was irrelevant.

In *Board of Educ. v. Allen*, 392 U.S. at 241-42, the Court relying on *Everson* determined "the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another,' and bars too any 'tax in any amount, large or small . . . levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'"

In *Allen* the Court did not ignore the no-aid principle. Rather, it recognized while "*Everson* and later cases have shown that the line between state neutrality to religion and

state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State.'" *Id.* at 242. *Allen's* evaluation concluded there was no evidence of the textbooks being designed to promote any religious teaching. Accordingly, the Court declined to find the "statute results in unconstitutional involvement of the State with religious instruction." *Id.* at 248.

Likewise in *Walz*, the Court refused to end its inquiry with a neutral extension of benefits analysis. It concluded the aid was not direct because "the government does not [by permitting a real property tax exemption] transfer part of its revenue to churches but simply abstains from demanding that the church support the state." 397 U.S. at 675. The Court found such tax exemptions reduced, rather than enlarged, any "fiscal relationship between church and state." *Id.* at 676.

Concurring in *Walz*, Justice Brennan noted:

> Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempt enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, "[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income

> independently generated by the churches through voluntary contributions." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv. L. Rev. 513, 553 (1968). . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.

Id. at 690-91. Justice Brennan also noted in *Walz*, *id.* at 690, that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." Clearly, funding by the University of Virginia of a purely religious magazine would constitute a direct subsidy of religious activities, suspect under this Court's teaching in *Walz*.

Petitioners' reliance on *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), to support their claim "that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities" is likewise misplaced. (Petitioners' Brf. at 29). The Court in *Texas Monthly*, *id.* at 12-13, carefully pointed out that in *Walz* "[n]o particular activity of a religious organization -- for example, the propagation of its beliefs -- [was] specially promoted by the exemptions," citing *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

Nor does *Bradfield v. Roberts*, 175 U.S. 291 (1899), cited by petitioners, support their view that the neutrality component of the Establishment Clause nullifies the no-aid principle. The Court in *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988), squared the Court's *Bradfield* holding, affirming the principle enunciated in *Hunt v. McNair*, 413

U.S. 734, 743 (1973):

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

While petitioners quote Justice Powell's concurring opinion in *Witters* to support their claim that in an "as applied case the Court must look only at the use of the funds as a whole -- never at a specific application," they miss the thrust of Justice Powell's concern. Justice Powell relied upon the Court's analysis in *Mueller v. Allen*, 463 U.S. 388 (1983), as applied in *Witters*: "[A]id to religion [which] results from the private choices of individual beneficiaries" was not unconstitutional. *Witters*, 474 U.S. at 490-91. According to Justice Powell in *Mueller*, the Court did not "analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we look to the nature and consequences of the program *viewed as a whole*." (Citation omitted.) *Id.* at 492 (emphasis in original). Once again the focus is on the entire program not just its application.

Justice Powell's comments pertained only to such indirect aid as bus transportation in *Everson* or textbooks provided in *Allen*. His reference to *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780-89 (1973), makes such a conclusion abundantly clear.

This understanding of Justice Powell's views in *Witters* is consistent with his clearly articulated view of the no-aid principle stated in *Wolman v. Walter*, 433 U.S. 229, 263-64

(1977) (Powell, J., concurring in part and dissenting in part). His opinion in *Wolman* was aimed at explaining his approval of textbooks to students in *Allen* and his objection to lending instructional materials and equipment to sectarian schools in *Meek v. Pittenger*, 421 U.S. 349 (1975). Significantly, Justice Powell observed "the Court reaffirmed *Allen*, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- *so long as the aid is incapable of diversion to religious uses* [citation omitted] *and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions.*" *Id.* at 263 (emphasis supplied). Thus, Justice Powell was concerned both with whether the aid was provided directly to a pervasively sectarian organization and whether the aid was divertable to religious activities.

Justice Powell's no-aid analysis, like a thread, runs through this Court's establishment jurisprudence from *Everson* to *Zobrest* to *Grumet*. As the Court stated in *Meek*, 421 U.S. at 364-65:

> It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The *indirect and incidental benefits* to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. . . . [Citations omitted; emphasis supplied.]

Even in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), the lone decision permitting cash payments to sectarian schools, the Court found aid for religious teaching unacceptable. Basing its decision on *Wolman v. Walter*, the Court stated:

> "[t]he nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of the religious teaching," *ibid*, thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes."

Id. at 656.

Thus, arrangements which this Court found constitutional in *Regan* did not displace the line of cases where the Court found direct financial subsidies to be forbidden by the Establishment Clause. The payment by the University of Virginia to petitioners would constitute such direct financial subsidies.

III. THE ESTABLISHMENT CLAUSE STANDS AS AN IMPENETRABLE WALL AGAINST DIRECT FUNDING OF A SECTARIAN ORGANIZATION'S RELIGIOUS ACTIVITIES.

The University of Virginia is asked to provide direct financial aid to a sectarian organization that aspires to use public monies to proselytize. Such funding of a purely religious activity falls within the Establishment Clause

proscription because *substantial aid* flows *directly* to a *sectarian organization* for a *sectarian purpose.*

Amicus and petitioners agree the Establishment Clause limits only the power of government. But the government cannot be compelled to provide public funds to pervasively sectarian organizations particularly when such funds will be used for religious purposes. Petitioners would have the Free Exercise, Free Speech, Equal Protection, and Free Press Clauses of the First Amendment devour the Establishment Clause (Petitioners' Brf. at 22-23).

In *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), this Court affirmed a lower court decision which found a prohibition against use of public funds to aid religious schools constitutional. The next year in *Norwood v. Harrison*, 413 U.S. 455 (1973), this Court considered a case in which the State of Mississippi purchased textbooks and lent them to students in both public and private schools without regard to whether any participating private schools had racially discriminatory policies. This Court concluded the state is not required by the Equal Protection Clause to provide assistance to private schools in an equal manner to public schools. Chief Justice Burger wrote:

> Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian

> schools in some circumstances -- health care or textbooks, for example -- *a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.*

Id. at 462 (emphasis supplied).

Norwood, following the direct/indirect aid analysis, concluded *Everson* and *Allen* were "carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests. *Id.* at 468. The Court stated: "States may assist church-related schools in performing their secular functions [citations omitted] . . . because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Id.*

The *Norwood* Court acknowledged:

> [D]ecisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clauses. [Citation omitted.] This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such

> assistance touches on the conflicting values of the Establishment Clause by *indirectly benefiting* the religious schools and their sponsors.

Id. at 469 (emphasis supplied). *See also Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974).

Petitioners acknowledge inferentially that government may deny a benefit to a person because of the content of his speech if the government's interest is compelling (Petitioners' Brf. at 15). This Court in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 80 (1985), found -- even in a traditional public forum -- speakers can be excluded "when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." When direct funding for proselytizing is exacted, the University of Virginia has a compelling interest to deny such funding under the Establishment Clause.

Petitioners rely on *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), in asserting the Establishment Clause is not a bar to a free speech claim (Petitioners' Brf. at 25). However, these cases fail to support such an argument.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court concluded providing students with "equal access" to university facilities was only an incidental, indirect support of religion. *Id.* at 273, 274, and 275. Such support did not raise Establishment Clause concerns. Likewise, in *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), Justice Kennedy, joined by Justice Scalia, concluded the "equal access" statute providing for non-discriminatory student initiated and student led

religion clubs at high schools provided only "incidental benefits" to religion. *Id.* at 260.[10]

The matter on appeal involves more than accommodating the needs of students for campus access. Here the petitioners demand the University of Virginia fund the sectarian organization's religious indoctrination of other students. The university's action becomes direct. As such, it raises those concerns expressed by Justice White in his *Mergens* dissent concerning whether "a state university that pays for basketballs for the basketball team is . . . thereby required to pay for Bibles" for a religious organization. *Id.* at 287.

The Establishment Clause prohibits the use of public funds to directly pay for a Mass on a university campus held by the Newman Club. In fact, the line drawn in *Witters*, 474 U.S. at 481, still controls: "The State may not grant aid to a religious . . . [organization], whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious . . . [organization] from the State." (If the university has violated the non-establishment proscription with regard to

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[10]*Lamb's Chapel* did not involve direct aid to a sectarian organization. In rejecting the Establishment Clause defense, this Court referred to its decision in *Widmar*. It observed "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment." *Id.* at 2148. But the Court then noted that as in *Widmar* "permitting use of university property for religious purposes under the open access policy involved would not be incompatible with the Court's Establishment Clause cases." *Id.* Thus, the Court in *Lamb's Chapel* followed the direct/indirect aid analysis.

other groups, the solution is not to lower the wall; rather, to prohibit all future violations. Prior university violations of the Constitution cannot be used to justify further violations of the Establishment Clause.)

Petitioners can't comprehend the Establishment Clause's requirement that relationships between the state and pervasively sectarian organizations are fundamentally different from the state and secular entities. As Professor Carl H. Esbeck wrote in *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 371 (1984):

> *The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment*. For example, although the Amendment deals only by implication with associational rights, the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility). The place of religious institutions, therefore, has long been recognized as a special problem for which the establishment clause makes special provision. [Emphasis supplied].

The function of the Free Exercise Clause was not intended to breach the co-equal no-establishment proscriptions of the Establishment Clause:

> The Supreme Court has largely confined

> the application of the free-exercise clause to the protection of individual conscience against government abuses. This limiting construction by the Court is correct lest the clause become a ready excuse by anyone wanting to avoid the duties of citizenship. Thus, the task of governing the functional separation of church and state is properly left to the establishment clause. *Maintaining the integrity and independence of religious organizations requires that government neither be involved in worship nor become an agent for achieving sectarian propagation and inculcation. This is what it means for the state to be neutral.* Moreover, this structural separation of church and state not only guarantees an autonomous church but accrues to the benefit of individual religious liberty by ensuring that a person's government is not aiding a religion he or she does not share.

Esbeck, Carl, *The Establishment Clause: Assuring the Independence of Churches and a Neutral State*, Government Intervention in Religious Affairs, II 40, 55-56 (Dean M. Kelley ed., 1986) (emphasis supplied).

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit must be affirmed.

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Respectfully submitted,

LEE BOOTHBY
Counsel of Record
Boothby & Yingst
4545 42nd St., NW, Suite 201
Washington, DC 20016
(202) 363-1773

Counsel for Amicus Curiae
Council on Religious Freedom

Of Counsel:

Walter E. Carson
917 Daleview Drive
Silver Spring, MD 20901

Harold J. Lance
Rt. 3, Box 350
Dunlap, TN 37327

Robert W. Nixon
12501 Old Columbia Pike
Silver Spring, MD 20904

Rolland Truman
4522 Greenmeadow Road
Long Beach, CA 90808